No. 87 2101

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DEBORAH K. BOLLER, DANIEL W. ASPLUND, LUCY M. HOUSTON, AND WILLIAM E. CRAIG,

Petitioners,

v.

NATIONAL MEDIATION BOARD, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

and

TRANS WORLD AIRLINES INC.,

Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether, as the Court of Appeals held, the National Mediation Board has no affirmative duty to refrain from non-neutral election activities which deliberately affect the outcome of a union election, through disenfranchisement of 302 eligible employees, because this Court's Switchmen's Union decision precludes all judicial review.

2. Whether non-neutral activities of the National Mediation Board that infringe on employee exercise of statutory rights of association, violate the First Amendment of the United States Constitution and establish jurisdiction for judicial review under 28 U.S.C. §1337.*

Petitioners received service of petitioner TWA's brief No. 87-1918 (filed Thurs., 5/19/88) on Tues., 5/24/88.

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*Petitioners are individual passenger service employees of respondent Trans World Airlines, Inc.

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Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Deborah K. Boller, Daniel W. Asplund, Lucy M. Houston and William E. Craig respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above styled case.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit is reported at 839 F.2d 809 (D.C. Cir. 1988) and

reprinted in the appendix at 36a and 48a. The opinion and order of the United States District Court for the District of Columbia is reported at 654 F.Supp. 447 (D.D.C. 1987) and reprinted in the appendix at 1a and 32a. The Determination of Eligibility-Order of the National Mediation Board is reported at 13 N.M.B. No. 63 (1986) and reprinted in the appendix at 51a. The opinion of the United States District Court for the Southern District of Texas transferring venue to the District of Columbia is reported at 647 F.Supp. 1060 (S.D.Tx. 1986).

JURISDICTION

The judgment of the United States Court of Appeals was entered on February 19, 1988. Respondent Trans World Airlines, Inc., filed a timely petition for writ of certiorari in the case, No. 87-1918, on May 19, 1988. The jurisdiction of this Court to review the judgment of

the District of Columbia Circuit against petitioners is hereby invoked pursuant to 28 U.S.C. §1254(1) and Sup. Ct. Rule 19.5.

STATUTES INVOLVED

Relevant portions of the Railway Labor Act, 45 U.S.C. §§151 et seq., are involved in this case. The pertinent text of these provisions are set out in the Appendix at 61a.

STATEMENT OF THE CASE

The petitioners here are individual employees of respondent Trans World Airlines, Inc. ("TWA"). They work in the passenger service class or craft at TWA's Houston and San Antonio, Texas airport operations.

1. In January 1986, respondent International Association of Machinists ("IAM") filed a petition for Investigation of Representation Dispute of all TWA passenger service employees. The International Brotherhood of Teamsters ("Team-

sters") and the Independent Federation of Flight Attendants ("IFFA") joined in the application.

The National Mediatior Board ("Board") appointed a mediator to investigate the matter and on February 12, 1986, the Board found a representational dispute to exist among TWA's passenger service employees (J.A. 412).[1] "An all mail ballot election is hereby authorized using cut-off date of the last day of the payroll period prior to the initial scheduling of this dispute for investigation." (J.A. 412). A list of eligible voters was provided to the Board by TWA on February 19, 1986.

On March 6, 1986, flight attendants of TWA represented by the IFFA went on strike. TWA asked for volunteers from its workforce to temporarily fill in for the striking flight attendants while TWA

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[1] "J.A." references are to the Joint Appendix filed by the parties in the court of appeals.

trained replacements. Since flight attendants received approximately 50% of the wages of passenger service employees, petitioners volunteered for the assignment only after assurances that they would retain their pay, benefits, seniority and status as passenger service employees. J.A. 646-52.

Petitioners pay and duties were not changed or reclassified while on temporary duty. Neither did they receive TWA flight attendants' health and welfare benefits, J.A. 649. Neither were they permitted to choose their home station or flight schedule and were scheduled for flights only after all regular non-striking flight attendants had been given bids. Id.

Petitioner Boller flew as a temporary flight attendant from March 13 to May 3, 1986. Petitioner Asplund flew from March 7 to May 6, 1986. Petitioner Craig flew from March 7 to May 5, 1986.

Petitioner Asplund and other passenger service employees also chose to fly to keep the airline solvent and to help prevent a corporate sale or takeover. (J.A. 649 ¶ 11). Such an action against TWA would have affected their seniority and lowered their living standards. Id.

The Teamsters, on March 17, 1986, urged the Board to proceed with the election, even though a pending merger of TWA with Ozark Airlines was in progress, and to permit polling booths at certain airports. (J.A. 473). The Board determined to maintain its all mail ballot procedure to process the election results. The ballots were to be mailed on March 24, 1986 and were in fact sent from Washington, D.C. on March 24, 1986 to members of the passenger service craft or class of TWA. Petitioners received these ballots. (J.A. 646, ¶ 6; J.A. 649, ¶ 5). That same day, the Teamsters wrote the Board ex-

pressing concern as to the eligibility of those passenger service employees working as flight attendants, "particularly where permanent replacement status has been offered." (J.A. 608).

On April 2, 1986, the Board directed TWA to provide it with "a list of all employees presently on the eligibility list but working in another craft or class. TWA's attention is directed to section 5.303 of the NMB Representation Manual which states 'employees who are working regularly in another craft or class on the same carrier will be ineligible to participate in the craft or class involved in the Board representative's investigation.'" (J.A. 609). The Board did not conduct further hearings or take evidence to determine if any passenger service employees were "working regularly in another craft or class" within the meaning of § 5.303.

Thereafter, on April 22, 1986, the Teamsters filed a request with the Board to extend the election for two weeks to accommodate those passenger service employees who were employed as "flight crews" in order "to compensate for this unusual situation." (J.A. 489).

The issue was referred to mediator Joseph E. Anderson who scheduled a hearing for April 25, 1986 for the purpose of resolving the eligibility question. Mr. Anderson determined that the "contingent flight attendants" were working temporarily as flight attendants and were eligible to vote. (J.A. 35, ¶ 28). He also found that passenger service employees on furlough and medical leave were also eligible to vote.

On April 28, 1986, the Teamsters appealed the mediator's eligibility decisions. (J.A. 493). The Teamsters, on April 28, 1986, "protested" this decision

to the Board arguing that "[t]here is a reasonable likelihood that more of them will become permanent" and therefore ineligible to vote. (J.A. 493, 495). All ballots were impounded on that day. (J.A. 538). The IFFA, IAM and TWA supported the mediator's determination that contingent flight attendants should be permitted to vote. (J.A. 507, 508).

On April 28, 1986, TWA announced that it had completed training new flight attendants and that the contingent flight attendants would be released to their regular assignments on May 2, 1986. (J.A. 625, 628 ¶ 6). On that same day, Mr. Anderson informed counsel for TWA that "we know what ballots we have." (J.A. 605). On May 2, 1986, Mr. Anderson also informed TWA that the Teamsters were "pressuring the Board." (J.A. 606).

On May 13, 1986, the Board made a Determination of Eligibility-Order and

therein made "Findings of Law" on the Teamster's challenges, after the mail date had expired, and held that "all employees working as 'contingent flight attendants' on April 28, 1986, are ineligible to vote in NMB Case No. R-5610." 58a. Hence, it ordered the ballots counted on May 16, 1986 and ordered TWA to furnish it with a list of persons working as contingent flight attendants on April 28, 1986. 58a.

On May 14, 1986, TWA filed a motion to reconsider the Board's ineligibility determination. (J.A. 547). On May 20, 1986, Petitioner Asplund filed a request that the Board reconsider its eligibility decision and conduct a proper election in view of several "facts" wrongly considered by the Board. (J.A. 653).

On May 14, 1986, the Board denied TWA's motion for reconsideration. (J.A. 555). The Board never responded to plaintiff Asplund's motions to reconsider.

(J.A. 649, ¶ 20).

On May 23, 1986, the Board issued the results of the election, finding that of 4330 eligible voters, the IAM with 1279 votes would be certified. (J.A. 558). Had the Board not declared the 302 contingent flight attendants ineligible to vote, there would have been 4632 eligible voters and 2250 ballots filed accounting for only 48.6% of the craft or class. Consequently, additional votes by contingent flight attendants would have been required (to add up to more than 50% of the craft or class casting ballots) to permit any unionization of the carrier.

If the plaintiffs had known that they would be disenfranchised for working as temporary flight attendants prior to April 28, 1986, they would have taken steps to return to their permanent assignments, (J.A. 646, ¶¶ 15, 16), or not have agreed to leave at all.

All contingent flight attendants had returned to their permanent jobs prior to the Board's eligibility decision and ballot count. (J.A. 649, ¶ 21). All mail ballots were on hand and the number of ballots were known by the Board at that time. (J.A. 35, ¶ 35).

2. On June 10, 1986, Deborah K. Boller and Thomas Rhoades filed a complaint in the United States District Court for the Southern District of Texas to enjoin the Board's certification and to obtain a writ of mandamus to require that the contingent flight attendants' ballots be counted (J.A. 16). TWA filed its own verified complaint against the Board after the Boller and Rhoades complaint had been filed. (J.A. 46).

On August 29, 1986, the district court in Texas consolidated the Boller and TWA complaints and transferred venue to the District Court for the District of

Columbia. Boller v. NMB, 647 F.2d 1060 (S.D.Tx. 1986). The Fifth Circuit affirmed this decision.

Because of the record statements made by the Board's agent, Mr. Anderson, petitioners sought to verify the interference and pro-union activities of the Board itself through discovery.

Petitioners, however, were denied the opportunity to depose Mr. Anderson and respondent TWA was denied its right to receive interrogatory answers to its questions by the district court. (J.A. 585).

On Defendant Board and Machinists' Motions for Summary Judgment, the district court on February 18, 1987, issued a Memorandum and Order granting the Motions to Dismiss or for Summary Judgment and enjoined TWA from making changes in the working conditions of the passenger service class. The district court deter-

mined that the Board's "decision to treat the contingent flight attendants as flight attendants rather than as passenger service employees simply does not inflict injury of a gross or constitutional dimension." 9a.

The court of appeals conceded that petitioners here were not regularly working in another class or craft and that the Board's "treatment of these employees certainly does not cast the NMB in a very favorable light." 41a. The court of appeals, however, decided it had no jurisdiction to review the decision of the Board as it "is one of the narrowest known to the law," 40a, and the Board has no statutory duty of neutrality because the Railway Labor Act uses the word "neutral" not "as an adjective modifying the Board itself." 41a n.1.

IV. REASONS FOR GRANTING THE WRIT

The case is before the court because

the National Mediation Board chose to disenfranchise an entire class of 302 passenger service employees who temporarily assisted their employer in keeping TWA operating during a strike by its flight attendants' union. This group of 302 passenger service employees were at all times qualified to vote in the Board-sponsored election, but after choosing to associate with their employer, rather than the striking flight attendants, the Board determined they could not participate in the union election of their craft or class.

The Board's decision violates the petitioners' statutory right to choose a bargaining representative under section 2, Fourth of the Railway Labor Act, not have the government base a decision concerning their statutory right to vote on the basis of a free exercise of the rights to associate with their employer, and denying

them the freedom to associate with fellow employees in the statutory election of a bargaining representative of their own choice.

This case presents a serious threat to statutory employee rights of association under the Railway Labor Act and exerts a telling blow to employee expectations that their government will respect the will of the majority.

I. THE DISTRICT OF COLUMBIA CIRCUIT IRRETRIEVABLY ERRED IN SQUARELY DECIDING THAT THE BOARD HAS NO DUTY OF NON-NEUTRALITY, AND EVEN IF IT DID, SUCH WOULD NOT VIOLATE THE RAILWAY LABOR ACT

In the instant case, plaintiffs contend that the pleadings reflect such a gross violation of the statute in that the board's decision to decertify the decisive block of eligible voters on so tenuous a basis after the cut-off of eligibility date and the receipt of all ballots violates a statutory duty of neutrality. However, there is no express statutory duty of neutrality, even if plaintiffs' complaints were taken to adequately allege a violation of such duty.

The court of appeals primarily based its ruling on the 4-3 decision of the Court in Switchmen's Union of North America v. NMB, 320 U.S. 297 (1943) ("Switchmen's"). In Switchmen's the majority concluded that judicial review was not available of a Board decision that all yardmen of the carrier would constitute an appropriate craft or class for purposes of representation, rather than preserving separate representation for "certain designated parts of the system." 320 U.S. at 299.

The majority in Switchmen's determined that under the "special circumstances" of the case "[w]here Congress has not expressly authorized judicial review, the type of problem involved and the history of the statute in question become highly relevant in determining whether judicial review may nonetheless be supplied." 320 U.S. at 300, 301. The review

of the legislative history undertaken by the Court demonstrated that Congress was very concerned that the Board be a "neutral tribunal" in resolving "highly controversial" labor problems. Hence, Commissioner Eastman's views are injected with approval, because "it was thought that the prestige of the Mediation Board might be adversely affected by the rulings which it would have to make in these jurisdictional disputes," Congress also provided for a committee of three neutral persons to "'designate the employees who may participate in the election.' That provision in the statute was added so that the Board's 'own usefulness of settling disputes that might arise thereafter might not be impaired.'" 320 U.S. at 303.

Hence, the Court, notably, described that "[t]he function of the Board is more the function of a referee." 320 U.S. at 304. With this concept in mind, the Court

concluded that the Board's authority "to interpret the meaning of 'craft' . . . gave it no enforcement functions. It was to find the fact and then cease . . . . There was to be no dragging out of the controversy into other tribunals of law." 320 U.S. at 305.

The Court did not have occasion to address whether a district court's jurisdiction to review "any law regulating commerce" might be available if an action of the Board "would have robbed the Act of its vitality and thwarted its purpose. Such considerations are not applicable here. The Act in §2, Fourth, writes into the law the 'right' of the 'majority of any craft or class of employees' to determine who shall be the representative of the craft or class for the purposes of the Act." 320 U.S. at 300-01. That "right" was to be solely protected by the Board under section 2, Ninth for reasons Con-

gress apparently "decided upon." Id. "All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced." 320 U.S. at 301. This important question of law is presented in the instant case.

In Brotherhood of Railway and Steamship Clerks v. Association for the Benefit of Non-Contract Employees, 380 U.S. 650 (1963), the Court again concluded that the Board's class or craft determination developed for a carrier consistent with the Board's experience in the industry and with other carriers, without a hearing, met its obligation to investigate the dispute "as the nature of the case requires." 380 U.S. at 662, 666.

The Court also discussed at length the impact the certification might have on a carrier, citing with approval Virginia Ry. Co. v. System Federation No. 40, 300 U.S. 515, 558-59 (1937), "[t]he quality of

the action compelled, its reasonableness, and therefore the lawfulness of the compulsion, must be judged in the light of the conditions which have occasioned the exercise of governmental power." In the setting of the case, the Court once again observed:

> The Board, as we noted in Switchmen's Union, performs the "function of a referee," It does not select one organization over another; it simply investigates, defines the scope of the electorate, holds the election and certifies the winner.

380 U.S. at 667.

In the setting of Switchmen and Non-Contract Employees, then, the Court was presented with cases simply not implicating the fairness or impartiality of the decision rendered by the Board. The court of appeals below, however, misreads these cases as if this court would not consider a different rule of justiciability, if the Board undertook an active role in the selection of a representative. Rather,

the court of appeals ruled that "there is no express duty of neutrality, even if plaintiffs' complaints were taken to adequately allege a violation of such duty." 41a. The reasoning was derived from the fact that "[t]he use of the word 'neutral' in the statute . . . does not occur as an adjective modifying the Board itself." 41a n.1.

The legal question presented here provides a situation even more compelling for review, because the court of appeals agreed with petitioners that,

> The employees in question, including individual plaintiffs in this action, were concededly on temporary assignment as flight attendants. All were regularly employed as passenger service employees within the bargaining unit relevant to the controversy out of which the disputed election arose.

38a.

The court of appeals also observed that the Board's decision disenfranchising petitioners was "purportedly on the basis of its prior decision in Trans World Air-

ways, Inc., 8 N.M.B. 663 (1981)." 3a. The court of appeals, however, distinguished the Board's own case for "[i]n that opinion, the employees in question . . . were actually on permanent assignments . . . not paralleled by the concededly temporary flight service attendants who desired to vote in the craft or class of their regular employment. 39a.

Next, the court of appeals acknowledged petitioners' contention that section 5.302 of the Board's Case Handling Manual, could not support a reasonable construction by the Board that petitioners were "working regularly in another craft or class."

> Certainly, their argument is an appealing one. Unfortunately for plaintiffs, both the District Court and this Court are without the power to grant the relief prayed, judicial review of NMB decisions is one of the narrowest known to the law.

40a.

II. THE DECISION BELOW DIRECTLY CONFLICTS WITH ANY MODERN NOTION THAT FREEDOM TO ASSOCIATE WITH OTHER PERSONS IN A LABOR DISPUTE IS UNIDIRECTIONAL IN NATURE AND NOT AVAILABLE IN ASSOCIATION WITH AN EMPLOYER

Yet, in determining that the Board's erroneous decision on the facts combined with the unrebutted affidavit of TWA counsel that the Board knew the 302 passenger service employees working as temporary flight attendants would affect the outcome of the election, the court of appeals completely fails to explain how a "gross violation" of the Railway Labor Act or constitutional rights are not affected. Until this decision, freedom of association to join a labor organization had always been considered a protected right. Thomas v. Collins, 323 U.S. 516 (1945). Moreover, it strains the very presumptions given to the Board by this Court in Switchmen, that the agency established by Congress to protect the section 2, Fourth "right", could be exercised in a partisan

manner.

Under the Board's own rules, if petitioners had chosen to associate with the striking flight attendants, honored the picket line and not gone to work at their regular jobs during the strike, their votes would have been counted. Because they chose to associate with TWA and work to protect their long term interests in preserving the carrier and, thus, their jobs, the Board directed them to be disenfranchised. The right of association thus, is at the core of their complaint here.

The court of appeals' departure from this established line of cases, under the facts herein, raises a serious and grave shadow on the future exercise of employee rights under the RLA that requires this Court's attention. It, moreover, validates the concern of the dissent of Mr. Justice Reed in Switchmen's, that em-

ployees have a concrete interest in the selection of a representative under the Railway Labor Act, irrebuttably an act of Congress regulating commerce, 320 U.S. at 318:

> It was only natural therefore that Congress should assume that where its own creature, the Mediation Board, was charged with interference with the right of employees by a misconstruction of the statute under which it existed, that error of law would be subject to judicial examination to determine the correct meaning.

Significantly, the dissent also discloses that the "Board feels such review has been profitable" citing to the Board's Annual Report of 1938, p. 5, that court review is "very helpful to the Board in that they serve to settle issues which, in the past, have frequently arisen to trouble the orderly and prompt adjustment of disputes over representation between different factions among employees." 320 U.S. at 319 n.18.

Since the District of Columbia

Circuit is the leading circuit engaging in the interpretation of Board law, its additional creation that only a "gross violation of the statute," 5a, may be cause for judicial review also is erroneous and should be reversed. See IBT v. BRAC, 402 F.2d 196, 205 (D.C. Cir. 1968), cert denied, 393 U.S. 848 (1968). The court nowhere explains why only a "gross" violation of the Railway Labor Act is unacceptable and not any other. The practice of the court of appeals, then, fulfills the prophesy of the dissent in Switchmen's:

> By requiring a plain sanction for a judicial remedy, the court authorized the Mediation Board to determine not only questions judicially found to be committed to its discretion, as in Gray v. Powell, supra [314 U.S. 402], but the statutory limits of its own power as well. It seems more consonant with the genius of our institutions to assume . . . Congress intended the general judicial authority conferred by the Judicial Code to be available to a union and its members aggrieved by an administrative order presumably irreconcilable with a statutory right so explicitly

> framed as the right to bargain through representatives of the employees' own choosing.

320 U.S. at 321-22.

This view also presents a plain and indistinguishable reading of Congress' intent that the federal regulation of labor relations be consistently handled in a non-discriminatory manner. The National Labor Relations Board would never permit a question of impropriety to linger over its election process. That agency has repeatedly declared that it will invalidate elections where its agents undermine the "indispensible perception of Board neutrality in an election." Hudson Aviation Systems, Inc., 288 N.L.R.B. No. 94 (April 29, 1988). It has also corrected electoral decisions where its own agents mislead employees concerning their statutory rights. Paul Parden (Vanity Fair Mills), 256 N.L.R.B. No. 168 (1981). The flip-side of impartial federal labor

relations policy is carved out for the National Mediation Board, which is now authorized by the District of Columbia Circuit Court of Appeals to engage in partisan activity because "there is no statutory duty of neutrality."

The instant case presents perhaps the last opportunity to examine whether or not Congress intended that its agencies be treated so differently in judicial review and neutrality of action. The court of appeals sends the wrong signal to the Board that its powers, not employee rights, are preeminent. This interpretation of the Railway Labor Act cannot stand.

The special circumstances of this case also directly implicate a problem concerning the Board which Congress in the Railway Labor Act legislative history certainly could not have deemed unacceptable. Thus, on the basis of Switchmen's, 320 U.S. at 301, the "history of the

statute" and the intent of the Act supplies the necessary elements for jurisdiction of the federal courts under 28 U.S.C. §1337 to "be nonetheless supplied."

CONCLUSION

For the reasons set out above, petitioners respectfully request that writ of certiorari be issued to review the decision below.

Respectfully submitted,

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June 23, 1988

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO,	)	
Plaintiff,	)	Civil Action No. 86-1912
v.	)	
TRANS WORLD AIRLINES, INC.,	)	
Defendant.	)	
TRANS WORLD AIRLINES, INC., et al.,	)	
Plaintiffs,	)	Civil Action No. 86-2980
v.	)	
NATIONAL MEDIATION BOARD, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,	)	
Defendants.	)	

MEMORANDUM

These two consolidated cases concern union representation of the passenger service employees of Trans World Airlines, Inc. ("TWA"). In Civil Action No. 86-1912, the International Association of Machinists and Aerospace Workers ("IAM")

seeks an order requiring TWA to commence bargaining over the wages, rules, and working conditions of the TWA passenger service employees and enjoining TWA from altering the wages, rules, and working conditions they obtained on May 23, 1986. On that date the National Mediation Board ("NMB") certified the IAM as the bargaining representative for TWA's passenger service employees. In Civil Action No. 86-2960, which was originally filed in the United States District Court for the Southern District of Texas, the plaintiffs, including TWA and several individual passenger service employees, seek to set aside the NMB certification. That suit was transferred to this Court from the Texas court on August 29, 1986.[1]

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[1] Civil Action No. 86-2960 was originally two separate suits, Boller v. NMB, (C.A. No. H-86-2348) and TWA v. NMB, (C.A. No. H-86-2350). These cases were consolidated by Judge Gabrielle K. McDonald in her order transferring them to this Court.

I.

The sole issue in Civil Action No. 86-2980 and a threshold question in Civil Action No. 86-1912 is whether this court should vacate the NMB certification of the IAM as the representative of the TWA passenger service employees. The focus of this issue is the NMB decision to exclude from the representation election TWA passenger service employees who were serving as flight attendants at the time of the election while the regular flight attendants participated in a strike called by the Independent Federation of Flight Attendants ("IFFA").

By a telegram dated February 12, 1986, the NMB authorized a mail ballot election of TWA's passenger service employees. Three unions participated in the election, the IAM, the IFFA and the International Brotherhood of Teamsters ("Teamsters"). The NMB mailed its ballots

on March 28, 1986, and scheduled the vote count for April 28, 1986. Trans World Airlines, Inc., 13 NMB 210 (1986). On April 22, 1986, the Teamsters requested that the voting period be extended for two weeks unless the Board deleted from the eligibility lists former passenger service employees who were then employed during an IFFA strike as TWA flight attendants. Representatives of all three unions and TWA met with NMB mediator Joseph Anderson on April 25, 1986, to review the list of eligible voters. A further meeting was held on April 28, 1986. On that date, Mediator Anderson determined that employees working as strike replacements for TWA flight attendants were eligible voters in the passenger service employees' representation election. The Teamsters appealed this determination and the ballots were impounded pending the resolution of the appeal. The Board

issued its written decision on May 13, 1986, holding that employees who were working as "contingent flight attendants" were ineligible to vote within the craft or class of passenger service employees. See Trans World Airlines, Inc., 13 NMB 210, 216 (1986). A May 14, 1986 motion for reconsideration of this decision filed by TWA was denied by the Board on May 15, 1986. The next day, the Board counted the mail ballots and on May 23, 1986 it announced that a majority of eligible voters had voted for a union and that the IAM had received a majority of the pro-union votes.[2] 13 NMB 237 (1986). Accordingly, the Board certified the IAM as the authorized representative of the passenger service employees. Id. at 238.

It has been established for over 20

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[2]Of 4330 eligible employees, 1279 cast votes for the IAM, 935 cast votes for the Teamsters and 36 cast votes for the IFFA. See 13 NMB 237, 238 (1986).

years that courts have no authority to review NMB certification decisions in the absence of a showing on the face of the pleadings that the certification decision was a gross violation of the Railway Labor Act or that it violated the constitutional rights of an employer, employee or union. Brotherhood of Ry. and S.S. Clerks v. Association for the Benefit of Non-Contract Employees, 380 U.S. 650, 658-60, 661-2 (1965) ("Railway Clerks"); Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297, 303 (1943) ("Switchmen's Union"); International Association of Machinists and Aerospace Workers v. National Mediation Board, 425 F.2d 527, 536 (D.C. Cir. 1970); International Brotherhood of Teamsters v. Brotherhood of Ry. Airline and S.S. Clerks, 402 F.2d 196, 205 (D.C. Cir.) cert. denied, 393 U.S. 848 (1968) ("IBT v. BRAC").

Despite the assiduous efforts of their counsel, plaintiffs have failed to demonstrate either a gross violation of the Act or any violation of the Constitution. Plaintiffs' attempts to characterize this case as one where the NMB has failed to perform its statutory duty to "investigate" a representation dispute are not persuasive. See Section 2, Ninth of the Railway Labor Act, 45 U.S.C. § 152, Ninth. For example, TWA purports to find a violation of this statutory obligation to "investigate" in its discovery that some documents which it believes should be in the NMB's file are not there. In addition, the plaintiffs allege that the NMB's determination regarding the contingent flight attendants was erroneous and that the NMB therefore could not have "investigated" the dispute.

There is authority for judicial intervention where the NMB certified a

union solely on the basis of signature cards authorizing an election and then refused to investigate the ensuing dispute, International In-Flight Catering Co. v. National Mediation Board, 555 F.2d 712, 718 (9th Cir. 1977), and where the NMB refused to investigate an individual's application to represent some fellow employees, Russell v. National Mediation Board, 714 F.2d 1332 (5th Cir. 1983), cert. denied, 467 U.S. 1204 (1984). Here, it is undisputed that NMB investigated the representation dispute among TWA's passenger service employees and conducted a mail ballot election. Moreover, the Board also "investigated" the eligibility dispute and issued a written opinion which was based on NMB precedent. See Chicago and North Western Ry. Company, 4 NMB 240 (1965); Trans World Airways, Inc., 8 NMB 663 (1981). TWA can not therefore evade the strictures against judicial review of

NMB certification decisions by characterizing its complaint about the substance of the Board's decision as a "failure to investigate" claim.

The claims of the individual plaintiffs are no more substantial than those of TWA. These plaintiffs were passenger service employees who responded to TWA's call for volunteers while the permanent flight attendants were on strike and who were still serving as flight attendants when this disputed election occurred. The NMB decision to treat the contingent flight attendants as flight attendants rather than as passenger service employees simply does not inflict injury of a gross or constitutional dimension. Nor is there any merit in these plaintiffs assumption that they would have been ineligible to vote as flight attendants where, as here, the NMB never precluded such participation, and there is no showing that the

plaintiffs endeavored to participate in Independent Federation of Flight Attendant affairs. The foregoing disposes of any glimmering claims of plaintiffs that the NMB impaired their First Amendment associational rights. TWA invited the individual plaintiffs to serve as flight attendants and they voluntarily accepted. NMB had no role in the individual plaintiffs serving as flight attendants so that there is no basis for a contention that NMB has any responsibility for plaintiffs being flight attendants at the time of this election for passenger service employees. Nor did the NMB interfere with plaintiffs' associational rights when it determined that plaintiffs' voting rights followed their voluntary change in jobs.

Both TWA and the individual plaintiffs allege that the NMB acted on the basis of an impermissible pro-union bias when it made its decision regarding the

contingent flight attendants.[3] It is unclear whether a proven instance of "non-neutrality" would constitute a gross violation of a specific provision of the Railway Labor Act or would be sufficient to transform a disagreement about a Board decision into a constitutional claim.

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[3]In particular, TWA alleges that on April 28, 1986, the date the ballots were impounded pending decision on the Teamsters appeal, "it was apparent from the ballot impounding procedure that approximately 2300 ballots had been cast--a number either close to or just shy of the number of ballots necessary for certification of a representative." See TWA's Memorandum in Response to NMB's and IAM's Rule 12(b)(6) and Rule 56 Motions for Summary Judgment and NMB's Rule 12(b)(1) Motion to Dismiss at 6. In addition, TWA has alleged that the "NMB and all parties to [the case] were aware that declaring the contingent flight attendants ineligible to vote would reduce the number of potential eligible voters and thereby increase the chances for a Union victory." See id. at 6-7. This assertion is difficult to square with the undisputed fact that two of the unions, the IAM and the IFFA, supported the mediators determination that the contingent flight attendants were eligible to vote. See also Individual Plaintiffs' Response in Opposition to Defendants' Motions to Dismiss or for Summary Judgment at 2.

There is no occasion to decide that question, however, because the plaintiffs have failed to proffer any substantial evidence to support this claim. In the absence of such a proffer, they have not demonstrated an error that is "obvious on the face of the papers." See IBT v. BRAC, 402 F.2d at 205. Permitting extensive discovery, such as that requested by these plaintiffs,[4] whenever a party alleges a lack of "neutrality" would contradict the Supreme Court's admonition that "the dispute [is] to reach its last terminal point when an administrative finding is made." Switchmen's Union, 320 U.S. at 305. An accompanying order will therefore

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[4]On July 14, 1986, TWA served the NMB and the Teamsters with interrogatories and document requests. In addition, the individual plaintiffs noticed the deposition of Mediator Anderson on October 29, 1986. A November 18, 1986 protective order stayed discovery pending resolution of the dispositive motions filed by the NMB and the IAM. That order is mooted by the resolution of these motions.

grant the NMB and IAM motions for summary judgment dismissing the plaintiffs' challenges to the May 23, 1986 Certification.

II.

In Civil Action No. 86-1912, IAM seeks judicial enforcement of legal rights it claims to have been created in it by virtue of its May 23, 1986 certification. Specifically, IAM seeks an order compelling TWA to "treat" with it as bargaining representative of the TWA service employees as required by section 2, Ninth of the Railway Labor Act, 45 U.S.C. § 152, Ninth, and an injunction against any changes in TWA's working rules for these employees which have been effected by TWA since the May 23 certification.

The IAM claim that TWA should have been treating or negotiating with respect to the service employees is firmly grounded in the governing statute.

Paragraph Ninth of 45 U.S.C. § 152 provides without equivocation that

> Upon receipt of [a] certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter.[5]

Despite the clear command of this statute and the clearly expressed congressional intention to limit the role of the judiciary in its administration, TWA has taken the adamant position that it will

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[5]This refusal to negotiate following certification is not only a clear violation of Section 2, Ninth of the Railway Labor Act; it is also contrary to Section 2, First of the Act which provides, in part, that "[i]t shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions . . . ." 45 U.S.C. § 152, First. Furthermore, there is a strong argument that this conduct is in violation of Section 2, Fourth, which guarantees that "[n]o carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees. . . ." 45 U.S.C. § 152, Fourth.

not negotiate with the IAM, unless and until ordered to do so by a court. An accompanying order will accommodate that demand. While TWA challenged the certification in Texas, it never asked the Texas Court, this Court or any court for leave to delay negotiations. It simply defied the statutory command and took the law into its own hands. In fact, in a remarkably audacious response to an IAM request to begin negotiations, TWA replied:

> In view of the pending proceedings [in Texas] and in order to preserve our full rights to judicial review, it would be inappropriate and, indeed, that (sic) it may be unlawful, for TWA to commence bargaining or otherwise deal with the IAM as the representative of the passenger service employees at this time when its representation status is in question. Therefore we intend not to do so until this matter is finally resolved.

Exhibit C to the IAM's Statement of Material Facts as to Which There is no

Genuine Dispute at 2 (emphasis added).[6]

While TWA held IAM at bay with its refusal to deal thereby precluding the formation of a collective bargaining agreement with respect to the TWA passenger service employees,[7] it made important unilateral changes in the working conditions of the IAM represented service employees. Specifically, TWA gave flight attendants a role in passenger preboarding, a change that, however desirable as an economy or an efficiency, would have been clearly bargainable if a collective bargaining agreement had been in place. TWA's ability to proceed unilaterally was enhanced by the delay in the decision of the Texas Court to transfer the certifica-

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[6]At oral argument, TWA's counsel was unable to supply any authority for this flat contradiction of the language of the statute.

[7]IAM and TWA have for many years had a collective bargaining agreement with respect to thousands of other TWA employees.

tion case to this Court, and by a frivolous appeal of that transfer order filed by the individual plaintiffs. Under these circumstances, this Court was reluctant to act on IAM's prayer for interlocutory relief while responsibility for the certification case was in limbo. In retrospect, IAM had established its entitlement to an order compelling negotiation as of July 8, 1986, when it applied for a temporary restraining order. Whether this situation can be rectified remains to be seen. It is clear that an order compelling TWA to negotiate with the union in good faith should be entered now. See Virginian R.R. Co. v. System Fed. No. 40, 300 U.S. 515, 544-45, (1937); Railway Clerks, 380 U.S. at 658; Aeronautical Radio, Inc. v. National Mediation Board, 380 F.2d 624 627 (D.C. Cir.), cert. denied, 389 U.S. 912 (1967).

III.

IAM's prayer for a further order re-establishing working conditions as they existed on May 23 1986, when it was certified poses a more difficult question. Paragraph Seventh of 45 U.S.C. § 152 provides that:

> No carrier. . .shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 156. . . .

Section 156 suspends "intended change[s] in agreements affecting rates of pay, rules, or working conditions" during a waiting period and mediation or an opportunity for mediation by the NMB. 45 U.S.C. § 156. In Williams v. Jacksonville Terminal Co., 315 U.S. 386, 400-03 (1942), the Supreme Court limited judicial authority to preserve working conditions in status quo under section 156 to conditions embodied in pre-existing collective bargaining agreements. The

potential scope of the holding in Williams was substantially narrowed in the later case of Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union, 396 U.S. 142 (1969), in which the Court held that the "status quo extends to those actual objective working conditions out of which the dispute arose" and that "these conditions need not be covered in an existing agreement." Id. at 153-54. The Detroit & Toledo Shore Line Court therefore required that an employer comply with the status quo requirements of Section 156 during a dispute over a condition of employment that was not covered in its existing collective bargaining agreement with the union. In reaching this conclusion, the Court noted that "[t]he Act's status quo requirement is central to its design." Id. at 150.

The philosophy of Detroit & Toledo Shore Line is clearly at odds with the

reasoning in Williams. However, the Detroit & Toledo Shore Line Court did not "paus[e] to comment upon the present validity" of Williams and distinguished that case on the grounds that there was "absolutely no prior history of any collective bargaining or agreement between the parties on any matter." Id. at 303. Williams therefore precludes the relief sought by IAM with respect to changes in working conditions heretofore effected.

The Court has considered whether it is authorized, despite Williams, to enjoin future changes in the status quo, now that TWA is firmly obligated to commence bargaining with the IAM.[8] In this case,

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[8]It is undisputed that such changes are planned by TWA. For example, TWA has issued a memorandum notifying all personnel that the position of "reservation agent-in-charge" is being eliminated. See Exhibit A to the Declaration of Timothy Connally (attached to the IAM's Reply Memorandum). These employees are within the passenger service craft or class.

unlike Williams,[9] it is established and the Court has found that TWA's failure to commence negotiations on or about May 23, 1986, when the NMB certified the IAM, is a clear violation of the law. If TWA had complied with its statutory obligation to treat with the IAM in a reasonable time after certification, the collective bargaining waiting period and mediation process created by the statute "would have been well advanced, if not completed, by now." These circumstances require an order barring any further changes in wages, rules and working conditions outside the collective bargaining/mediation process prescribed in the Railway Labor Act's status quo provisions. This result is thoroughly consistent with Williams as illuminated by Detroit &

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[9] In Williams, the union and the employer successfully negotiated a collective bargaining agreement after the union's request for negotiations. See 315 U.S. at 402.

Toledo Shore Line. The injunction requiring negotiations will emphasize the good faith obligation imposed by Paragraph Seventh of 45 U.S.C. § 152 by barring further unilateral changes in working conditions and other interference with the IAM's performance of its representation responsibilities.

Finally, the Court must consider whether its authority to issue such relief is barred or constrained by the provision of the Norris-LaGuardia Act, 29 U.S. §§ 101 et seq. Section 4 of that Act provides that certain actions arising out of labor disputes shall not be subject to injunction. TWA's attempt to characterize its unilateral changes in working conditions as one of these unenjoinable acts is unsupported by citations to case law and is utterly unconvincing.[10] Moreover,

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[10]For example, TWA asserts that it is protected from a status quo injunction by (continued...)

it has long been established that the requirements of the Norris-LaGuardia Act must be accommodated to the specific provision of the Railway Labor Act, see Brotherhood of R.R. Trainmen v. Chicago River and Indiana R.R. Co., 353 U.S. 30, 40-42 (1957), and that the judiciary is empowered to issue an injunction when it is "the only practical, effective means" of enforcing a duty imposed by the Railway Labor Act. Chicago & North Western Ry. Co. v. United Transp. Union, 402 U.S. 570,

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[10](...continued)
29 U.S.C. § 104(d) which forbids an injunction prohibiting any person from "aiding any person participating or interested in any labor disputes, who. . . is prosecuting . . . any action or suit in any court of the United States." See TWA's Memorandum in Opposition to the IAM's Motion for Summary Judgment Ordering TWA to Restore and Maintain "Status Quo" at 30. TWA claims that an order requiring it to maintain current working conditions would somehow prohibit it from aiding the individual plaintiffs in this lawsuit. Id. It is unclear how TWA believes that altering the current working conditions "aids" these passenger service employees unless it is by weakening the authority of the union.

582 (1971). In this case, it is undisputed that TWA has consistently refused to bargain with the certified representative of its passenger service employees. Indeed, it has taken the untenable position that it would be unlawful to bargain before judicial review of the certification has run its course, presumably through this Court, the Court of Appeals and the certiorari process of the Supreme Court. TWA has thereby extended the power to alter working conditions under Williams v. Jacksonville Terminal Co., 315 U.S. 386 (1942), well beyond the time contemplated by any plausible interpretation of the Railway Labor Act. An injunction requiring TWA to commence bargaining and prohibiting any further unilateral changes is therefore the only "practical, effective means" of protecting the employees' rights to organize and bargain collectively under the Act and such

an injunction may therefore be issued despite the anti-injunction provision of the Norris-LaGuardia Act.

TWA argues in the alternative that this Court must follow certain procedural requirements of the Norris-LaGuardia Act before issuing any injunctive relief. They involve section 7 of that Act which provides, in part, that

> No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute . . . except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect --
>
> (a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained . . .;
>
> (b) That substantial and irreparable injury to complainant's property will follow;
>
> (c) That as to each item of relief granted greater injury will be

inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

> (d) That complainant has no adequate remedy at law; and
>
> (e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

29 U.S.C. § 107. TWA argues that this provision requires this Court to hold an evidentiary hearing before issuing any injunctive relief. At that hearing it could be anticipated that TWA would offer testimony on the issues of fact specified by the Norris-LaGuardia Act, namely, whether this action threatens substantial and irreparable injury to [IAM's] "property" and whether the injury to TWA posed by such an injunction is greater than the injury that will be inflicted on the IAM if relief is denied. See TWA's Rule 108(h) Statement of Material Facts Necessary to be Litigated at 13.

TWA has cited no case holding that this Court is required to hold such a hearing or make these findings before ordering an employer to perform the duties prescribed in the Railway Labor Act. Indeed, such a decision would violate the principle, firmly established by the Supreme Court, that the explicit provisions of the Railway Labor Act take precedence over the commands of the Norris-LaGuardia Act. This rule of interpretation does not apply exclusively to the prohibition of injunctions contained in Norris-LaGuardia Act Section 4. In Virginian R.R. Co. v. System Fed. No. 40, 300 U.S. 515, (1937), for example, an employer challenged a trial court order requiring it to treat with a union certified pursuant to the Railway Labor Act on the ground that the order did not comply with section 9 of the Norris-

LaGuardia Act.[11] The Supreme Court held that

> The evident purpose of [section 9], as its history and context show, was not to preclude mandatory injunctions, but to forbid blanket injunctions against labor unions, which are usually prohibitory in form, and to confine the injunction to the particular acts complained of and found by the court. We deem it unnecessary to comment on other similar objections, except to say that they are based on strained and unnatural constructions of the words of the Norris-LaGuardia Act, and conflict with its declared purpose, section 2 (29 U.S.C.A. § 102), that the

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[11] That section provides, in part, that

> No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided in this chapter.

employee "shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

300 U.S. at 563. Virginian Railroad Co. therefore requires that the procedural provisions of the Norris-LaGuardia Act be read in light of that Act's stated policies and that these provisions can not be construed to conflict with the relief authorized under the Railway Labor Act. In this case, no valid purpose would be served by holding the evidentiary hearing contemplated in section 7 of the Norris-LaGuardia Act. The facts central to this Court's ruling, i.e., that TWA has refused to negotiate with the certified representative of its employees and has altered the terms and conditions of employment, are not in dispute. Moreover, the required findings of fact contained in section 7 are simply inapplicable in this

case where a union seeks to compel an employer to comply with the commands of the Railway Labor Act. The Norris-LaGuardia Act's policy of protecting the rights of "the individual, unorganized worker" to "full freedom of association, self-organization, and designation of representatives of his own choosing to negotiate the terms and conditions of his employment" (emphasis added) would be ill served by further postponing the resolution of this matter in order to hold a time-consuming evidentiary hearing. 29 U.S.C. § 102. Moreover, it is inconceivable that Congress intended to permit a union to enforce the rights explicitly granted to it under the Railway Labor Act only upon a showing that denial of enforcement would result in "irreparable harm" to the union's "property." For these reasons, TWA's contention that the provisions of section 7 of the Norris-

LaGuardia Act must be satisfied in this case must be rejected. Accord Brotherhood of R.R. Carmen of America, Local No. 429 v. Chicago & North Western Ry. Co., 354 F.2d 786, 796 (8th Cir. 1965); Local 553, Transport Workers Union of America v. Eastern Air Lines, Inc., 544 F. Supp. 1315, 1329-31 (E.D.N.Y. 1982), aff'd in relevant part, 695 F.2d 668, 678-79 (2d Cir. 1982).

Date: February 18, 1987

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO,	)	
Plaintiff,	)	Civil Action No. 86-1912
v.	)	
TRANS WORLD AIRLINES, INC.,	)	
Defendant.	)	
TRANS WORLD AIRLINES, INC., et al.,	)	
Plaintiffs,	)	Civil Action No. 86-2980
v.	)	
NATIONAL MEDIATION BOARD, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,	)	
Defendants.	)	

ORDER

I.

Consolidated Civil Action No. 86-2980 comes before the court on the International Association of Machinists and Aerospace Workers' ("IAM") Motion for Summary Judgment and the National Mediation

Board's Motion to Dismiss, or in the Alternative, for Summary Judgment. For the reasons stated in the accompanying memorandum, it is this 18th day of February, 1987, hereby

ORDERED: that the IAM's Motion for Summary Judgment and the NMB's Motion to Dismiss, or in the Alternative, for Summary Judgment, should be, and are hereby, GRANTED; and it is further

ORDERED: that the complaints in consolidated Civil Action No. 86-2980 should be, and are hereby, DISMISSED.

II.

Civil Action No. 86-1912 is before the court on the IAM's motion for injunctive relief. The undisputed material facts of record establish that Trans World Airlines, Inc., ("TWA") has refused to negotiate with the IAM over the wages, rules and working conditions of its passenger service employees despite a May 23,

1986 certification by the National Mediation Board. This refusal to negotiate with the duly certified representative of its employees violates Section 2, First, Fourth and Ninth of the Railway Labor Act, 45 U.S.C. § 152, First, Fourth and Ninth. This unlawful behavior has extended unreasonably the time during which TWA is privileged to unilaterally alter the working conditions of its employees under Williams v. Jacksonville Terminal Co., 315 U.S. 386 (1942). Accordingly, it is hereby

ORDERED: that Trans World Airlines, Inc., its officers, agents and assigns shall treat with the IAM as the certified collective bargaining representative of the craft and class of passenger service employees, pursuant to Section 2, Ninth of the Railway Labor Act, 45 U.S.C. § 152, Ninth, and it is further

ORDERED: that Trans World Airlines,

Inc., its officers, agents and assigns, shall henceforth be enjoined from making any further unilateral changes in the wages, rules and working conditions of the passenger service employees prior to the exhaustion of the dispute resolution procedures of the Railway Labor Act. 45 U.S.C. § 156.

February 18, 1987

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5092

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO

v.

TRANS WORLD AIRLINES, INC., APPELLANT

No. 87-5093

TRANS WORLD AIRLINES, INC., APPELLANT

DEBORAH K. BOLLER, et al.

v.

NATIONAL MEDIATION BOARD, et al.

No. 87-5176

TRANS WORLD AIRLINES, INC., APPELLANT

DEBORAH K. BOLLER, et al.

v.

NATIONAL MEDIATION BOARD, et al.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Appeals from the United States District Court
for the District of Columbia

(Civil Action Nos. 86-01912 and 86-02980)

Argued January 7, 1988

Decided February 19, 1988

Eric Rosenfeld for appellant Trans World Airlines. *Deborah A. Folloni* and *Ronald A. Lindsay* entered appearances for appellant Trans World Airlines.

Michael E. Avakian for appellants Deborah K. Boller, et al.

Mark W. Pennak, Attorney, Department of Justice, with whom, *Richard K. Willard*, Assistant Attorney General, *Joseph E. diGenova*, United States Attorney, *Ronald M. Etters*, General Counsel, National Mediation Board and *John F. Cordes*, Attorney, Department of Justice were on the brief, for appellees National Mediation Board. *William Kanter*, Attorney, Department of Justice, also entered an appearance for appellee National Mediation Board.

John A. Edmond, with whom *Joseph Guerrieri, Jr.*, was on the brief, for appellee International Association of Machinists and Aerospace Workers.

Before RUTH B. GINSBURG, WILLIAMS, and SENTELLE, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SENTELLE.

SENTELLE, *Circuit Judge*: These three consolidated appeals concern union representation of passenger service employees of Trans World Airlines, Inc. (TWA). In the District Court, TWA and the individual plaintiffs sought

to set aside the National Mediation Board (NMB) certification of the International Association of Machinists and Aerospace Workers (IAM) as bargaining representative. IAM sought an order requiring TWA to commence bargaining and enjoining TWA from altering wages, rules and working conditions, and to retroactively restore conditions to those that existed on May 23, 1986 (the date on which IAM was certified as the bargaining representative for the passenger service employees). The District Court held that the certification of IAM as the bargaining representative was unreviewable pursuant to *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943). The District Court then ordered TWA to commence bargaining and enjoined *prospective*, unilateral changes in working conditions. TWA appeals both the certification and the injunction against prospective unilateral changes. As to the first of those questions, we find no error and affirm. As to the second, we reverse.

I.

The threshold question is whether this Court should reverse the District Court and vacate the NMB certification of IAM as the representative of TWA's passenger service employees. If we answer this issue in favor of TWA and against IAM, the injunction becomes void. TWA's attack on the certification is grounded on the NMB's decision to exclude from the representation election TWA passenger service employees serving as temporary flight attendants while regular flight attendants were on strike. The relevant facts are set out in detail in the District Court's opinion, *International Association of Machinists v. TWA, Inc.*, 654 F. Supp. 447 (D.D.C. 1987), and we will repeat only those necessary to an understanding of this decision.

The employees in question, including individual plaintiffs in this action, were concededly on temporary assignment as flight attendants. All were regularly employed

as passenger service employees within the bargaining unit relevant to the controversy out of which the disputed election arose. As passenger service employees, they enjoyed higher wages than flight attendants and accepted the volunteer assignments after TWA's announcement that they would retain their current job title, salary, benefits, status, and seniority. Nonetheless, since the employees were actually working in "another craft or class" on the date of the election, the NMB declared them ineligible, purportedly on the basis of its prior decision in *Trans World Airways, Inc.*, 8 N.M.B. 663 (1981). In that opinion, the employees in question, rather than being on temporary assignment, were actually on permanent assignments but sought eligibility to vote in prior positions as to which they retained "recall" rights. The affected employees in the case before us, together with TWA, suggest that the prior NMB decision is plainly distinguishable since the employees in the prior case had a "present interest in their present craft or class" not paralleled by the concededly temporary flight service attendants who desired to vote in the craft or class of their regular employment. TWA and the individual plaintiffs contend that this resulted in unfairness and was not supported by the evidence before the Board.

The election was in fact a very close one. Certification would be granted only if a majority of eligible voters cast ballots in favor of representation. The decertification decision, with reference to the individual plaintiffs and others of their class, was made after all ballots had been received. 1,279 eligible voters cast ballots for IAM, 935 for International Brotherhood of Teamsters, and 36 for the IFFA. Thus, 2,250 valid ballots were cast in favor of representation. The total number of valid ballots was 4,308 so that 51.96% voted in favor of representation. Had the 302 questioned employees been eligible, the 2,250 votes cast would have amounted to only

48.88%, and certification would not have been in order. It was on this basis that TWA and the individual plaintiffs prayed the District Court to void the certification.

They argue that under the Board's own representation manual, revised edition effective on November 1, 1985, temporary employees of the sort represented by plaintiffs here should have been counted in their regular craft. Section 5.302 of that manual reads:

> Employees who are working *regularly* in another craft or class on the same carrier will be considered ineligible to participate in the craft or class involved in the Board representative's investigation. (Emphasis supplied).

Plaintiffs contend that under no reasonable construction of "regularly" can these employees be found ineligible. Certainly, their argument is an appealing one. Unfortunately for plaintiffs, both the District Court and this Court are without the power to grant the relief prayed. Judicial review of NMB decisions is one of the narrowest known to the law. As the District Court noted, "It has been established for over twenty years that courts have no authority to review NMB certification decisions in the absence of the showing on the face of the pleadings that the certification decision was a gross violation of the Railway Labor Act or that it violated the constitutional rights of an employer, employee, or Union." 654 F. Supp. at 450. Citing *Brotherhood of Railway and S.S. Clerks v. Association for the Benefit of Noncontract Employees*, 380 U.S. 650, 658-660, 661-62 (1965); *Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297, 303 (1943), *inter alia*.

In the instant case, plaintiffs contend that the pleadings reflect such a gross violation of the statute in that the Board's decision to decertify the decisive block of eligible voters on so tenuous a basis after the cut-off of eligibility date and the receipt of all ballots violates a statutory

duty of neutrality. However, there is no express statutory duty of neutrality, even if plaintiffs' complaints were taken to adequately allege a violation of such duty.[1] And the "peek at the merits" permitted to this Court when reviewing NMB decisions, *IBT v. BRAC*, 402 F.2d 196, 205 (D.C. Cir. 1968), *cert. denied sub nom. BRAC v. NMB*, 393 U.S. 848 (1968), does not disclose a "gross violation of the statute."

Similarly unavailing is plaintiffs' argument that the Board's disenfranchisement of the temporary flight attendants constitutes a violation of constitutional rights. The disenfranchised voters and TWA claim that the voters' "right of association" was violated by NMB's decertifying them, which they contend was for associating with TWA. They offered the District Court no authority for this proposition, nor have they offered any here, nor indeed have we independently found any such authority. While the treatment of these employees certainly does not cast the NMB in a very favorable light, that treatment does not reach the level of violating a constitutional right, and we are constrained to hold, for the reasons stated by the District Court, that plaintiffs have failed to demonstrate either a gross violation of the Railway Labor Act, 45 U.S.C. § 151 *et seq.*,[2] or any violation of the Constitution. Therefore, under the principles set forth in *Switchmen's Union v. National Mediation Board*,

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[1] The use of the word "neutral" in the statute occurs in fact at 45 U.S.C. § 152, Ninth, "in the conduct of any election for the purposes herein indicated, the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three *neutral* persons who after hearing shall within 10 days designate the employees who may participate in the election." (Emphasis supplied). The word neutral does not occur as an adjective modifying the Board itself.

[2] The provisions of the Railway Labor Act, except 45 U.S.C. § 153, are applicable to airlines. 45 U.S.C. § 181.

320 U.S. 297 (1943), the certification of the IAM as bargaining representative is not reviewable.

II.

TWA's challenge to the District Court injunction against unilateral change of working conditions is more troublesome. After certification, TWA refused to treat with the newly certified representative pending resolution of litigation over the validity of the certification and made unilateral changes in working conditions, specifically by giving flight attendants a role in passenger pre-boarding—"a change that, however desirable as an economy or an efficiency, would have been clearly bargainable if a collective bargaining agreement had been in place." 654 F. Supp. at 452. IAM prayed the District Court to order TWA to bargain in good faith, which the District Court did; to roll back the unilateral change in working conditions, which the District Court refused; and to enjoin TWA from making further unilateral changes in working conditions pending the entry of a collective bargaining agreement.[3] In considering the third section of IAM's prayer for injunctive relief, the District Court weighed relevant authorities to determine that TWA's refusal "to negotiate with the IAM over the wages, rules, and working conditions of its passenger service employees despite . . . certification by the National Mediation Board," was a violation of "Section 2, First, Fourth, and Ninth of the Railway Labor Act, 45 U.S.C. § 152, First, Fourth, and Ninth." 654 F. Supp. at 456. The District Court then ordered that TWA "be enjoined from making any further unilateral changes

[3] The first two rulings in the District Court's injunction are not under attack here and are in accordance with fixed principles of railway labor law. *See generally* 45 U.S.C. § 152 and authorities collected in *International Association of Machinists & Aerospace Workers v. Trans World Airlines, Inc.*, 654 F. Supp. 447 (D.D.C. 1987).

in the wages, rules, and working conditions of the passenger service employees prior to the exhaustion of the dispute resolution procedures of the Railway Labor Act. 45 U.S.C. § 156." *Id.* at 456. In so doing, the District Court overstepped its statutory authority.

As the District Court noted, paragraph Seventh of 45 U.S.C. § 152[4] provides that:

> No carrier . . . shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 156. . . .

The referenced section suspends "intended change[s] in agreements affecting rates of pay, rules, or working conditions" during a waiting period and mediation or an opportunity for mediation by the NMB. 45 U.S.C. § 156.[5] However, as the District Court also noted, the Supreme Court in *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386 (1942), held that the injunctive power granted by Section 6 for the preservation of the status quo is limited by the terms of the Act to those situations in which the status quo reflects a pre-existing collective bargaining agreement. The *Williams* case, like the case at bar, involved an attempt by the Union to enjoin changes in working conditions when no collective bargaining agreement was in place. That opinion expressly holds:

> The institution of negotiations for collective bargaining does not change the authority of the carrier. The prohibitions of § 6 against change of wages or conditions pending bargaining and those of § 2, Seventh, are aimed at preventing changes in conditions previously fixed by collective bargaining agreements. Arrangements made after collective bargaining obviously are entitled to a higher degree of

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[4] This section is also referred to hereinafter as "Section 2."

[5] This section is also referred to hereinafter as "Section 6."

> permanency and continuity than those made by the carrier for its own convenience and purpose.

Id. at 403. The District Court recognized this limitation from *Williams* but noted that later Supreme Court cases evidence an erosion in the principle set forth in that case.

In *Detroit and Toledo Shoreline R.R. v. United Transportation Union*, 396 U.S. 142 (1969), the Supreme Court considered a case in which a previous collective bargaining agreement was in place but management made unilateral changes in working conditions as to subjects not expressly covered in that agreement. Justice Black, writing for the Court, noted that "[t]he Railway Labor Act was passed . . . to encourage collective bargaining by [carriers] and their employees in order to prevent, if possible, wasteful strikes and interruptions of interstate commerce." *Id.* at 148 (footnote omitted). He further noted that the status quo provisions of the Act were central to its design and that Sections 5, 6, and 10 "together with § 2 First, form an integrated, harmonious scheme for preserving the status quo from the beginning of the major dispute[6] through the final 30-day 'cooling off' period." *Id.* at 152. The Court then held that "the status quo extends to those actual, objective working conditions out of which the dispute arose, and clearly these conditions need not be covered in an existing agreement." *Id.* at 153. The Court then distinguished the *Williams* decision as being one in which there was no pre-existing collective bargaining agreement while the *Detroit and Toledo* situation presented an existing agreement which did not cover the specific working conditions subjected to the unilateral change. At this point, the Court described *Williams* in language that indicated erosion of the precedential force of that decision:

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[6] The *Detroit and Toledo* case defines "'a major dispute' [as] one arising out of the *formation* or change of collective agreements covering rates of pay, rules, or working conditions." *Id.* at 145 n.7 (emphasis supplied) (citations omitted).

> In *Williams* there was absolutely no prior history of any collective bargaining or agreement between the parties on any matter. Without pausing to comment upon the present vitality of either of these grounds for dismissing the . . . Railway Labor Act claim [in *Williams*] it is readily apparent that *Williams* involved only the question of whether the status quo requirement of § 6 applied. . . .

Id. at 158. As the District Court notes, this certainly casts some doubt on the continuing willingness of the Supreme Court to follow the *Williams* precedent in a case not factually distinguishable from it. However, *Detroit and Toledo* plainly stops short of overruling *Williams* and leaves it binding in a case like the one before us where there has been "absolutely no prior history of any collective bargaining or agreement between the parties on any matter." *Id.*

Since the *Detroit and Toledo* opinion, the Supreme Court has signaled a further erosion of the *Williams* principle in *Chicago and Northwestern R.R. v. United Transportation Union*, 402 U.S. 570 (1970). In that case there had been a prior collective bargaining agreement but that agreement had expired and the mediation process was complete. Therefore, like the case at bar, there was no immediately enforceable collective bargaining agreement on any subject. The Union prepared to strike. Management sought to enjoin the Union. Thus, as in the case at bar, one party to the negotiation sought to judicially prevent the other from invoking self-help. The Supreme Court found the substance of the complaint before it to be the Union's alleged failure to perform its obligations under Section 2, First, which imposes upon management and labor the duty "to exert every reasonable effort to *make* and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes. . . ." 45 U.S.C. § 152, First (emphasis supplied). The Court, after weighing the legislative history, determined that Section 2, First, imposed a legal

duty upon the parties independent of the duties under Section 6, holding:

> [W]e think it plain that § 2 First, was intended to be more than a mere statement of policy or exhortation to the parties; rather, it was designed to be a legal obligation, enforceable by whatever appropriate means might be developed on a case-by-case basis.

Id. at 577. And, the Court further held that these "appropriate means" could include injunction against a strike. It would seem apparent that the power to enjoin the Union's self-help measure—strikes—implies the concomitant power to enjoin management's self-help measure —a potentially strike-provoking unilateral change in work conditions. This seems particularly true when in each instance the power is aimed at enforcing the same duty arising out of Section 2, First, as quoted above and furthering the congressional goal of maintaining uninterrupted interstate commerce as described by Justice Black.

Therefore, while the legal foundation of the District Court's power to issue an injunction like the one issued here does exist, nonetheless, the *Williams* case holding, though weakened, is not dead. None of the Supreme Court cases cited above and no other case, before or since, has overruled *Williams*. Thus, no power to enjoin unilateral changes in working conditions by management flows from Section 6 of the Act in the absence of pre-existing, in place, collective bargaining agreements. The independent duty found by the Court under Section 2, First, in the *Chicago and Northwestern* case is a limited one. The Court expressly held that the injunctive remedy would be available only "where a strike injunction is the only practical, effective means of enforcing the command of § 2 First." 402 U.S. at 582. Plainly the same restrictive test should apply in enjoining self-help by management. In *Burlington Northern R.R. v. BMWE*, —— U.S. ——, 107 S. Ct. 1841 (1987), the Supreme Court underscored

the limited circumstances under which this drastic remedy is available stating "[c]ourts should hesitate to fix upon the injunctive remedy . . . unless that remedy alone can effectively guard the plaintiff's right." *Id.* at ——, 107 S. Ct. at 1851 (quoting *International Assn. of Machinists v. Street*, 367 U.S. 740, 773 (1961)).[7]

While the District Court's opinion in the case before us does quote the limiting language from *Chicago and Northwestern R.R.* to the effect that the injunction is "the only practical, effective means" of enforcing a duty imposed by the Railway Labor Act, in this case that finding is not at this time supported by the record. In *Chicago and Northwestern, all* the procedures for negotiations, mediation, and "cooling off" period had been attempted before resort to the injunctive measure. Here, the first steps had not yet been taken when the final leap occurred. Therefore, we are constrained to conclude that so long as *Williams* remains the law, the District Court lacks the power to employ this drastic measure, absent a showing of unavailability or ineffectiveness of other remedies. Thus, as to this assignment of error and this one only, we reverse the decision of the trial court, while affirming that decision in all other particulars. In short, the order of the District Court is affirmed in part, and reversed in part.

[7] *Burlington Northern R.R. v. BMWE* is also one of a long line of cases making plain that the anti-injunction provisions of the Norris-La Guardia Act, 29 U.S.C. §§ 101-115, do not prevent the strike injunctions, above discussed, in appropriate limited circumstances. *See, e.g., Chicago and Northwestern R.R. v. Transportation Union, supra* at 581, and authorities collected therein.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5092 Civil Action No. 86-01912

International Association of Machinists & Aerospace Workers, AFL-CIO

v.

Trans World Airlines, Inc.,

Appellant

No. 87-5093 Civil Action No. 86-02980

Trans World Airlines, Inc.,

Appellant

Deborah K. Boller, et al.

v.

National Mediation Board, et al.

87-5176 Civil Action No. 86-02980

Trans World Airlines, Inc.,

Appellant

Deborah K. Boller, et al.

v.

National Mediation Board, et al.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: RUTH B. GINSBURG, WILLIAMS, and SENTELLE, Circuit Judges.

JUDGMENT

These causes came on to be heard on the records on appeal from the United

States District Court for the District of Columbia, and were argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED, by the Court, that the judgment of the District Court appealed from in these causes is hereby affirmed in part and reversed in part, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For The Court
/s/ Constance L. Dupre,
Clerk

Date: February 19, 1988
Opinion for the Court filed by Circuit Judge Sentelle

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

13 NMB No. 63
Case No. R-5610

May 13, 1986

In the matter of the Application of the

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO

alleging a representation dispute pursuant to Section 2, Ninth, of the Railway Labor Act

involving employees of

TRANS WORLD AIRLINES, INC.

DETERMINATION OF ELIGIBILITY-ORDER

On January 9, 1986, the International Association of Machinists & Aerospace Workers, AFL-CIO (IAM&AW) filed an application pursuant to Section 2, Ninth, of the Railway Labor Act, 45 U.S.C. § 2, Ninth, alleging the existence of a representation dispute among personnel described as "Passenger Service Employees" of Trans World Airlines, Inc. (TWA). Said application was docketed as NMB Case No. R-5610. Later that day, the International Brotherhood of Teamsters (IBT) filed an application. The Independent Federation of Flight Attendants (IFFA), on January 21, 1986, filed an application to represent these employees.

At the time the applications were filed, these employees were not represented by any individual or organization.

The Board assigned Board Representative Joseph E. Anderson to investigate.

On February 12, 1986, the Board found a dispute to exist. A mail ballot election was authorized with the count to be conducted in Washington, D.C. The ballots were mailed on March 28, 1986, with the count scheduled for April 28, 1986.

On April 25, 1986, representatives of the IBT, IAM&AW, IFFA and TWA met with Mr. Anderson for the purpose of reviewing the list of eligible voters. These representatives met with Mr. Anderson again on April 28, 1986.

Mr. Anderson, on April 25 and 28, 1986, issued several eligibility determinations. Several of these determinations were appealed by the IBT. The IAM&AW and TWA responded to the IBT's appeal on May 2, 1986. In its letter, one of the issues that the IAM&AW appealed was Mr. Anderson's determination that John W. Busch is eligible. IFFA, on April 28, 1986, submitted a written response to only the question of the eligibility of the "contingent flight attendants." The ballots were impounded by the Board pending consideration of the IBT's appeal.

On May 2, 1986, the IBT supplemented its appeal. The IBT also appealed to Mr. Anderson to include three individuals, John Busch, Denise Masset and Vicki Joseph.

ISSUES

Based on the Board's investigation of the appeal filed by the IBT and the IAM&AW, the issues are as follows:

1. Whether employees temporarily working outside the craft or class as "contingent flight attendants" are eligible voters; and
2. If the above employees are determined to be eligible, whether the voting period should be extended by two weeks; and
3. Whether the Scheduled Airline Traffic Office (SATO) employees are eligible voters; and
4. Whether the name of all individuals for whom ballots were returned to the Board as undeliverable should be removed from the eligibility list; and

5. Whether all employees on medical leave for more than two years are eligible voters; and
6. Whether all employees on furlough for more than two years are eligible voters; and
7. Whether Earl Trout, John Busch, Denise Massei and Vicki Joseph are eligible voters.

CONTENTIONS

The IBT contends that the subject "contingent flight attendants" are ineligible because they are working outside of the craft or class. The IBT asserts that the "controlling factor" is the "present status" of these individuals. Their expectation of return to the passenger service craft or class, the IBT argues, is speculative and "Board precedent dictates their exclusion since their present status is determinative." TWA argues that the employees are temporarily working as flight attendants and will be returned to the passenger service craft or class as permanent flight attendants are hired and trained. It is the position of the IAM&AW and IFFA that these employees are eligible.

The IBT argues that the voting period should be extended two weeks if the Board determines that the "contingent flight attendants" are eligible. This extension, the IBT contends, is necessary in order to give the organizations "an opportunity to communicate with these individuals and to give them an opportunity to vote." The IAM&AW is opposed to any extension of the voting period.

It is the IBT's position that all SATO employees should be removed from the eligibility list. It is this organization's understanding that these individuals will become employees of a separate corporation named SATO, Inc., on May 1, 1986. TWA contends that the SATO employees are eligible. TWA admits that a corporation has been formed but states that all present SATO employees will remain employees of TWA and that future personnel will be hired as employees of SATO, Inc. The IAM&AW argues that SATO employees are eligible.

The IBT seeks to remove from the eligibility list the names of all employees for whom ballots were returned to the Board as

undeliverable. The IBT asserts that since these employees have not received a ballot, leaving them on the list, "imputes a 'no' vote without reason." In support of this request, the IBT cites *Continental Airlines*, 11 NMB 46 (1984). TWA contends that it is the employee's obligation to notify the Carrier of any change in residence. The Carrier asserts that "it can only be concluded that they have chosen not to vote in this election" because notices have been posted informing employees of the election. The IAM&AW argues that the names of these individual should be removed because "basic notions of fairness require that rather than being counted as a procompany or no-union vote which [would] be the practical effect of continuing to treat those employees as eligible voters, they should not be counted for any purpose whatsoever."

The IBT argues that all employees on medical leave for more than two years are ineligible because they have no reasonable expectation of returning to work. TWA asserts that the Carrier has a "five-year return policy" for employees on medical leave and that employees on such leave are eligible. The IAM&AW contends that these employees are eligible.

The IBT contends that employees who are furloughed for more than two (2) years should be ruled ineligible because these employees have no reasonable expectation of returning to work. TWA states that employees have recall rights for a five year period and that the policy is systemwide. It is the position of the IAM&AW that these employees are eligible.

Finally, the IBT contends that Earl Trout III is ineligible because he was working outside of the craft or class on the cut-off date. The IAM&AW and the IBT assert that John Busch is ineligible. The IAM&AW contends that Busch became a permanent flight attendant on May 6, 1986. The IBT asserts that Busch was a "contingent flight attendant" on the date of the appeal. Denise Massei, the IAM&AW argues, is ineligible because she is presently in training to become a permanent flight attendant. The IBT argues that Vicki Joseph was terminated on March 24, 1985, and is ineligible. TWA and IFFA did not submit any information on the eligibility of Trout, Busch, Massei and Joseph.

FINDINGS OF LAW

Determination of the issues here involved is governed by Section 201, Title II, and Section 2, Title I, of the Railway Labor Act, as amended, 45 U.S.C. § 152 *et seq*. Accordingly, the Board finds as follows:

I.

Trans World Airlines is a common carrier by air as defined in Title II, Section 201, of the Act, 45 U.S.C. § 181.

II.

Section 2, Fourth, of the Act, 45 U.S.C. § 152, Fourth, gives employees subject to its provisions ". . . the right to organize and bargain collectively through representatives of their own choosing". The majority of any craft or class of employees shall have the right to determine who shall be the representatives of the craft or class for the purposes of this Act.

III.

Section 2, Ninth, of the Act, 45 U.S.C. § 152, Ninth, requires the National Mediation Board to investigate disputes which arise among a carrier's employees over representation, and to certify the duly authorized representatives of such employees. In determining the choice of the majority of employees under this section, the Board is required to designate who may participate as eligible voters in the event an election is required.

IV.

The IAM&AW, IBT, and IFFA are labor organizations and representatives as provided by Section 1, Sixth, 45 U.S.C. § 151, Sixth and Section 2, Ninth, 45 U.S.C. § 152, Ninth, of the Act.

DISCUSSION

I.

In the present case, the key date for eligibility purposes is the count date of April 28, 1986. The Board stated in *Chicago & North Western Railway Company*, 4 NMB 240 (1965) that:

> In representation disputes the Act deals with the present status and the present interest of the employees involved and not with potential future status and potential future interests of the employees. The Board has long adhered to the established and recognized practice to vote employees in the one craft in which they are employed at the time of the election.

In the previous TWA case involving the craft or class of Passenger Service Employees, NMB Case No. R-5163, the Board considered the eligibility of TWA employees who were working in another craft or class. In *Trans World Airways, Inc.*, 8 NMB 663 (1981), the Board stated:

> Under TWA's employment system, a furloughed employee may be 'rehired' in a different job and still retain recall rights to his original position. However, this does not alter the basic fact that the employee is still a TWA employee, and is employed in a position outside of the craft or class. These employees have a present interest in their present craft or class whether on the cut-off date or currently, rather than their former craft or class. Therefore, employees working in other crafts or classes either on the cut-off date or at the present time are ineligible.

For the above reasons, the Board finds that all employees working as "contingent flight attendants" on April 28, 1986, are ineligible to vote in NMB Case No. R-5610.

II.

Because of the above finding, it is unnecessary for this Board to rule upon the IBT's request to extend the voting period.

III.

The SATO employees are presently employees of TWA and are eligible voters. *See Chicago & North Western Railway Company*.

IV.

The Board has carefully considered the IBT's request to remove from the eligibility list the names of all individuals for whom ballots were returned to the Board as undeliverable. The Board notes that the facts in the present case differ from those in *Continental Airlines*, 11 NMB 46 (1983). Continental Airlines was undergoing at that time a curtailment of operations and had filed a petition in bankruptcy. The Board noted the disruptive effect of the bankruptcy and other personnel actions in 1983 on its ability to conduct a mail ballot election.

Based on the record before the Board in this case, the Board finds no reason to grant such an unusual request.

V.

It is stated in the Carrier's position statement that TWA has a five-year return policy for employees on medical leave. According to Section 5.306 of the NMB Representation Manual, employees on "authorized sick leave" are eligible. For these reasons, the Board finds that Mr. Anderson's determination was made in accordance with Board procedure and policy and is correct.

VI.

The Carrier has a five-year policy regarding furloughs. These employees have systemwide recall rights. Section 5.305 of the NMB Representation Manual states:

> Furloughed employees are considered eligible in the craft or class in which they last worked provided they retain an employer-employee relationship and have a reasonable expectation of returning to work.

The Board finds that these employees are eligible on the foregoing basis.

VII.

In reference to Earl Trout, the Board finds that there is insufficient evidence in the record to warrant a finding that this individual is ineligible.

VIII.

The IAM&AW and the IBT have appealed the eligibility of John W. Busch. If the Carrier's records reveal that Mr. Busch was a "contingent flight attendant" on April 28, 1986, he is ruled ineligible in accordance with the above findings.

The IBT has appealed the eligibility of Denise Massei contending that she is in training to become a permanent flight attendant. The same ruling applies to Massei.

The Board finds that the IBT has presented insufficient evidence to warrant reversal of Mr. Anderson's determination of eligibility regarding Vicki Joseph.

CONCLUSION AND ORDER

The Board finds that all employees working as "contingent flight attendants" or otherwise assigned to the position of "contingent flight attendant" on April 28, 1986 are ineligible. SATO employees are eligible voters in this case. All employees on medical leave or furlough are eligible. Earl Trout and Vicki Joseph are eligible. John Busch and Denise Massei are ineligible if the Carrier's record reveals that these individuals were "contingent flight attendants" on April 28, 1986.

The IBT's request to remove the names of all individuals for whom ballots were returned is denied.

It is ordered that the ballots previously impounded pending consideration of this appeal be counted at 11:00 a.m. on May 16, 1986. TWA is ordered to furnish the Board Representative with the names of all employees on the eligibility list who were working as "contingent flight attendants", or otherwise assigned to the position of "contingent flight attendants" on April 28, 1986, by 1:00 p.m. on May 15, 1986.

By direction of the NATIONAL MEDIATION BOARD.

/s/ CHARLES R. BARNES
Charles R. Barnes
Executive Director

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CRB/rwb

RAILWAY LABOR ACT
45 U.S.C. §§151-188

Section 2. Fourth

Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden. [45 U.S.C. §152, Fourth]

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere

in any way with the organization of its employees or to use the funds of the carrier in maintaining or assisting or contribution to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wage of employees payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: Provided, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during work hours without loss of time, or to prohibit a carrier from furnishing free transportation to its

employees while engaged in the business of a labor organization.

Section 2. Ninth

Disputes as to identity of representatives; designation by Mediation Board; secret elections. [45 U.S.C. § 152, Ninth]

If any dispute shall arise among a carrier's employees as to who are representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the indiviauals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier.

Upon receipt of such certification the carrier shall treat with the representatives so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the elec-

tion. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.